

AMENDED IN ASSEMBLY AUGUST 24, 2006
AMENDED IN ASSEMBLY SEPTEMBER 2, 2005
AMENDED IN ASSEMBLY AUGUST 30, 2005
AMENDED IN ASSEMBLY AUGUST 23, 2005
AMENDED IN ASSEMBLY AUGUST 15, 2005
AMENDED IN ASSEMBLY JULY 5, 2005
AMENDED IN ASSEMBLY JUNE 15, 2005
AMENDED IN SENATE MAY 3, 2005
AMENDED IN SENATE APRIL 12, 2005

SENATE BILL

No. 92

Introduced by Senator Murray Dunn

January 14, 2005

~~An act to add Section 22947.9 to the Business and Professions Code, relating to computer spyware. An act to add and repeal Section 20785 of the Public Contract Code, relating to public contracts.~~

LEGISLATIVE COUNSEL'S DIGEST

SB 92, as amended, ~~Murray Dunn. Computer spyware: penalties. Orange County Sanitation District design-build contracts.~~

~~Existing law prohibits a person or entity from, with actual knowledge, conscious avoidance of actual knowledge, or willfully, causing computer software to be copied onto a computer in California and using the software to (1) take control of the computer, as specified, (2) modify certain settings relating to the computer's access to or use of the Internet, as specified, (3) collect, through intentionally~~

~~deceptive means, personally identifiable information, as defined, (4) prevent, without authorization, an authorized user's reasonable efforts to block the installation of or disable software, as specified, (5) intentionally misrepresent that the software will be uninstalled or disabled by an authorized user's action, or (6) through intentionally deceptive means, remove, disable, or render inoperative security, antispyware, or antivirus software installed on the computer. Existing law also prohibits a person or entity that is not an authorized user from inducing an authorized user to install a software component by intentionally misrepresenting that it is necessary for security or privacy or in order to open, view, or play a particular type of content. Existing law prohibits a person or entity that is not an authorized user from deceptively causing the copying and execution on the computer of software components with the intent of causing an authorized user to use components in a way that violates any of these prohibitions.~~

~~This bill would, with specified exceptions, authorize a consumer who has computer software copied, installed, or executed on his or her computer in violation of these prohibitions, the consumer's Internet service provider, the Attorney General, or a district attorney to bring an action to recover actual damages or specified statutory damages. The bill would also make the violation of the prohibitions a crime, punishable as a misdemeanor. By creating a new crime, the bill would impose a state-mandated local program.~~

Existing law requires public entities to comply with certain procedures in soliciting and evaluating bids and awarding contracts for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis.

This bill would authorize, until January 1, 2012, the Orange County Sanitation District to enter into design-build contracts in excess of \$10,000,000, as defined, according to specified procedures. This bill would require the Orange County Sanitation District, if it chooses to enter into design-build contracts, to award projects using the best value method, as specified. This bill makes findings regarding the necessity of a special statute.

This bill, by requiring that specified information is to be verified under oath, would create a new crime or infraction.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 20785 is added to the Public Contract
2 Code, to read:
3 20785. (a) (1) This section provides for an alternative
4 procedure for bidding on construction projects in excess of ten
5 million dollars (\$10,000,000) applicable only in the Orange
6 County Sanitation District upon approval of its board.
7 (2) The Orange County Sanitation District may award the
8 project using either the lowest responsible bidder or by best
9 value.
10 (b) (1) It is the intent of the Legislature to enable the Orange
11 County Sanitation District to utilize cost-effective options for
12 building and modernizing public wastewater facilities. It is not
13 the intent of the Legislature to authorize this procedure for
14 transportation facilities, including, but not limited to, roads and
15 bridges.
16 (2) The Legislature also finds and declares that utilizing a
17 design-build contract requires a clear understanding of the roles
18 and responsibilities of each participant in the design-build
19 process. The Legislature also finds that the cost-effective benefits
20 to the Orange County Sanitation District are achieved by shifting
21 the liability and risk for cost containment and project completion
22 to the design-build entity.
23 (3) It is the intent of the Legislature to provide an alternative
24 and optional procedure for bidding on construction projects for
25 the Orange County Sanitation District.
26 (4) The design-build approach may be used, but is not limited
27 to use, when it is anticipated that it will: reduce project cost,
28 expedite project completion, or provide design features not
29 achievable through the design-bid-build method.

(5) If the Orange County Sanitation District Board elects to proceed under this section, the board shall establish and enforce for design-build projects a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code, or it shall contract with a third party to operate a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code. This requirement shall not apply to any project where the Orange County Sanitation District or the design-build entity has entered into any collective bargaining agreement or agreements that bind all of the contractors performing work on the projects.

(c) As used in this section:

(1) “Best value” means a value determined by objective criteria related to price, features, functions, and life cycle costs.

(2) “Design-build” means a procurement process in which both the design and construction of a project are procured from a single entity.

(3) “Design-build entity” means a partnership, corporation, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services as needed pursuant to a design-build contract.

(4) “Project” means the construction of a building and improvements directly related to the construction of a building, and constructing and modernizing public wastewater facilities. “Project” does not include the construction of other infrastructure, including, but not limited to, streets and highways, public rail transit, or water resources facilities and infrastructure.

(5) “Sanitation district” means the Orange County Sanitation District.

(d) Design-build projects shall progress in a four-step process, as follows:

(1) (A) The sanitation district shall prepare a set of documents setting forth the scope of the project. The documents may include, but are not limited to, the size, type, and desired design character of the project and site, performance specifications covering the quality of materials, equipment, and workmanship, preliminary plans or project layouts, or any other information deemed necessary to describe adequately the sanitation district’s needs. The performance specifications and

1 *any plans shall be prepared by a design professional who is duly*
2 *licensed and registered in California.*

3 *(B) Any architect or engineer retained by the sanitation*
4 *district to assist in the development of the project-specific*
5 *documents shall not be eligible to participate in the preparation*
6 *of a bid with any design-build entity for that project.*

7 *(2) (A) Based on the documents prepared in paragraph (1),*
8 *the sanitation district shall prepare a request for proposals that*
9 *invites interested parties to submit competitive sealed proposals*
10 *in the manner prescribed by the sanitation district. The request*
11 *for proposals shall include, but is not limited to, the following*
12 *elements:*

13 *(i) Identification of the basic scope and needs of the project or*
14 *contract, the expected cost range, and other information deemed*
15 *necessary by the sanitation district to inform interested parties of*
16 *the contracting opportunity, to include the methodology that will*
17 *be used by the sanitation district to evaluate proposals and*
18 *specifically, if the contract will be awarded to the lowest*
19 *responsible bidder.*

20 *(ii) Significant factors that the sanitation district reasonably*
21 *expects to consider in evaluating proposals, including cost or*
22 *price and all nonprice-related factors.*

23 *(iii) The relative importance of weight assigned to each of the*
24 *factors identified in the request for proposals.*

25 *(B) With respect to clause (iii) of subparagraph (A), if a*
26 *nonweighted system is used, the sanitation district shall*
27 *specifically disclose whether all evaluation factors other than*
28 *cost or price when combined are:*

29 *(i) Significantly more important than cost or price.*

30 *(ii) Approximately equal in importance to cost or price.*

31 *(iii) Significantly less important than cost or price.*

32 *(C) If the sanitation district chooses to reserve the right to*
33 *hold discussions or negotiations with responsive bidders, it shall*
34 *so specify in the request for proposal and shall publish*
35 *separately or incorporate into the request for proposal*
36 *applicable rules and procedures to be observed by the sanitation*
37 *district to ensure that any discussions or negotiations are*
38 *conducted in good faith.*

39 *(3) (A) The sanitation district shall establish a procedure to*
40 *prequalify design-build entities and all mechanical and electrical*

1 subcontractors using a standard questionnaire developed by the
2 sanitation district. In preparing the questionnaire, the sanitation
3 district shall consult with the construction industry, including
4 representatives of the building trades and surety industry. This
5 questionnaire shall require information including, but not limited
6 to, all of the following:

7 (i) If the design-build entity is a partnership, limited
8 partnership, or other association, a listing of all of the partners,
9 general partners, or association members known at the time of
10 bid submission who will participate in the design-build contract,
11 including, but not limited to, mechanical and electrical
12 subcontractors.

13 (ii) Evidence that the members of the design-build entity have
14 completed, or demonstrated the experience, competency,
15 capability, and capacity to complete projects of similar size,
16 scope, or complexity, and that proposed key personnel have
17 sufficient experience and training to competently manage and
18 complete the design and construction of the project, as well as a
19 financial statement that assures the sanitation district that the
20 design-build entity has the capacity to complete the project.

21 (iii) The licenses, registration, and credentials required to
22 design and construct the project, including information on the
23 revocation or suspension of any license, credential, or
24 registration.

25 (iv) Evidence that establishes that the design-build entity has
26 the capacity to obtain all required payment and performance
27 bonding, liability insurance, and errors and omissions insurance.

28 (v) Any prior serious or willful violation of the California
29 Occupational Safety and Health Act of 1973, contained in Part 1
30 (commencing with Section 6300) of Division 5 of the Labor Code
31 or the federal Occupational Safety and Health Act of 1970
32 (Public Law 91-596), settled against any member of the
33 design-build entity, and information concerning workers'
34 compensation experience history and their worker safety
35 program.

36 (vi) Information concerning any debarment, disqualification,
37 or removal from a federal, state, or local government public
38 works project. Any instance where an entity, its owners, officers,
39 or managing employees submitted a bid on a public works

1 *project and were found to be nonresponsive, or were found by an*
2 *awarding body not to be a responsible bidder.*

3 *(vii) Any instance where the entity, its owner, officers, or*
4 *managing employees defaulted on a construction contract.*

5 *(viii) Any violations of the Contractors' State License Law*
6 *(Chapter 9 (commencing with Section 7000) of Division 3 of the*
7 *Business and Professions Code), excluding alleged violations of*
8 *federal or state law including the payment of wages, benefits,*
9 *apprenticeship requirements, or personal income tax*
10 *withholding, or of Federal Insurance Contribution Act (FICA)*
11 *withholding requirements settled against any member of the*
12 *design-build entity.*

13 *(ix) Information concerning the bankruptcy or receivership of*
14 *any member of the design-build entity, including information*
15 *concerning any work completed by a surety.*

16 *(x) Information concerning all settled adverse claims,*
17 *disputes, or lawsuits between the owner of a public works project*
18 *and any member of the design-build entity during the five years*
19 *preceding submission of a bid pursuant to this section, in which*
20 *the claim, settlement, or judgment exceeds fifty thousand dollars*
21 *(\$50,000). Information shall also be provided concerning any*
22 *work completed by a surety during this period.*

23 *(xi) In the case of a partnership or other association, that is*
24 *not a legal entity, a copy of the agreement creating the*
25 *partnership or association and specifying that all partners or*
26 *association members agree to be fully liable for the performance*
27 *under the design-build contract.*

28 *(B) The information required pursuant to this subdivision shall*
29 *be verified under oath by the entity and its members in the*
30 *manner in which civil pleadings in civil actions are verified.*
31 *Information that is not a public record pursuant to the California*
32 *Public Records Act (Chapter 3.5, Division 7, Title 1 of the*
33 *Government Code) shall not be open to public inspection.*

34 *(4) The sanitation district shall establish a procedure for final*
35 *selection of the design-build entity. Selection shall be based on*
36 *either of the following criteria:*

37 *(A) A competitive bidding process resulting in lump-sum bids*
38 *by the prequalified design-build entities. Awards shall be made*
39 *to the lowest responsible bidder.*

1 (B) *The sanitation district may use a design-build competition*
2 *based upon best value and other criteria set forth in paragraph*
3 *(2) of subdivision (d). The design-build competition shall include*
4 *the following elements:*

5 (i) *Competitive proposals shall be evaluated by using only the*
6 *criteria and selection procedures specifically identified in the*
7 *request for proposal. However, the following minimum factors*
8 *shall each represent at least 10 percent of the total weight of*
9 *consideration given to all criteria factors: price, technical design*
10 *and construction expertise, life cycle costs over 15 years or*
11 *more, skilled labor force availability, and acceptable safety*
12 *record.*

13 (ii) *Once the evaluation is complete, the top three responsive*
14 *bidders shall be ranked sequentially from the most advantageous*
15 *to the least.*

16 (iii) *The award of the contract shall be made to the*
17 *responsible bidder whose proposal is determined, in writing, to*
18 *be the most advantageous.*

19 (iv) *Notwithstanding any provision of this code, upon issuance*
20 *of a contract award, the sanitation district shall publicly*
21 *announce its award, identifying the contractor to whom the*
22 *award is made, along with a written decision supporting its*
23 *contract award and stating the basis of the award. The notice of*
24 *award shall also include the sanitation district's second- and*
25 *third-ranked design-build entities.*

26 (v) *For the purposes of this paragraph, "skilled labor force*
27 *availability" shall be determined by the existence of an*
28 *agreement with a registered apprenticeship program, approved*
29 *by the California Apprenticeship Council, which has graduated*
30 *apprentices in each of the preceding five years. This graduation*
31 *requirement shall not apply to programs providing*
32 *apprenticeship training for any craft that has been deemed by the*
33 *Department of Labor and the Department of Industrial Relations*
34 *to be an apprenticeable craft in the five years prior to enactment*
35 *of this act.*

36 (vi) *For the purposes of this paragraph, a bidder's "safety*
37 *record" shall be deemed "acceptable" if their experience*
38 *modification rate for the most recent three-year period is an*
39 *average of 1.00 or less, and their average Total Recordable*
40 *Injury/Illness rate and average lost work rate for the most recent*

1 *three-year period does not exceed the applicable statistical*
2 *standards for its business category or if the bidder is a party to*
3 *an alternative dispute resolution system as provided for in*
4 *Section 3201.5 of the Labor Code.*

5 *(e) (1) Any design-build entity that is selected to design and*
6 *build a project pursuant to this section shall possess or obtain*
7 *sufficient bonding to cover the contract amount for nondesign*
8 *services, and errors and omissions insurance coverage sufficient*
9 *to cover all design and architectural services provided in the*
10 *contract. This section does not prohibit a general or engineering*
11 *contractor from being designated the lead entity on a*
12 *design-build entity for the purposes of purchasing necessary*
13 *bonding to cover the activities of the design-build entity.*

14 *(2) Any payment or performance bond written for the purposes*
15 *of this section shall be written using a bond form developed by*
16 *the sanitation district.*

17 *(f) All subcontractors that were not listed by the design-build*
18 *entity in accordance with clause (i) of subparagraph (A) of*
19 *paragraph (3) of subdivision (d) shall be awarded by the*
20 *design-build entity in accordance with the design-build process*
21 *set forth by the sanitation district in the design-build package. All*
22 *subcontractors bidding on contracts pursuant to this section*
23 *shall be afforded the protections contained in Chapter 4*
24 *(commencing with Section 4100) of Part 1. The design-build*
25 *entity shall do both of the following:*

26 *(1) Provide public notice of the availability of work to be*
27 *subcontracted in accordance with the publication requirements*
28 *applicable to the competitive bidding process of the sanitation*
29 *district.*

30 *(2) Provide a fixed date and time on which the subcontracted*
31 *work will be awarded in accordance with the procedure*
32 *established pursuant to this section.*

33 *(g) The minimum performance criteria and design standards*
34 *established pursuant to paragraph (1) of subdivision (d) shall be*
35 *adhered to by the design-build entity. Any deviations from those*
36 *standards may only be allowed by written consent of the*
37 *sanitation district.*

38 *(h) The sanitation district may retain the services of a design*
39 *professional or construction project manager, or both,*

1 throughout the course of the project in order to ensure
2 compliance with this section.

3 (i) Contracts awarded pursuant to this section shall be valid
4 until the project is completed.

5 (j) Nothing in this section is intended to affect, expand, alter,
6 or limit any rights or remedies otherwise available at law.

7 (k) (1) If the sanitation district elects to award a project
8 pursuant to this section, retention proceeds withheld by the
9 sanitation district from the design-build entity shall not exceed 5
10 percent if a performance and payment bond, issued by an
11 admitted surety insurer, is required in the solicitation of bids.

12 (2) In a contract between the design-build entity and the
13 subcontractor, and in a contract between a subcontractor and
14 any subcontractor thereunder, the percentage of the retention
15 proceeds withheld may not exceed the percentage specified in the
16 contract between the sanitation district and the design-build
17 entity. If the design-build entity provides written notice to any
18 subcontractor who is not a member of the design-build entity,
19 prior to or at the time the bid is requested, that a bond may be
20 required and the subcontractor subsequently is unable or refuses
21 to furnish a bond to the design-build entity, then the design-build
22 entity may withhold retention proceeds in excess of the
23 percentage specified in the contract between the sanitation
24 district and the design-build entity from any payment made by
25 the design-build entity to the subcontractor.

26 (l) If the sanitation district elects to proceed under this section
27 and uses the design-build method on a public works project, the
28 sanitation district shall submit to the Legislative Analyst's Office
29 before December 1, 2009, a report containing a description of
30 each public works project procured through the design-build
31 process. The report shall include, but shall not be limited to, all
32 of the following information:

33 (1) The type of project.

34 (2) The gross square footage, linear footage, or treatment
35 capacity, as applicable of the project.

36 (3) The design-build entity that was awarded the project.

37 (4) The estimated and actual length of time to complete the
38 project.

39 (5) The estimated and actual project costs.

1 (6) A description of any written protests concerning any
2 aspect of the solicitation, bid, proposal, or award of the
3 design-build project, including the resolution of the protests.

4 (7) An assessment of the prequalification process and criteria.

5 (8) An assessment of the effect of retaining the 5-percent
6 retention on the project.

7 (9) A description of the Labor Force Compliance Program
8 and an assessment of the project impact, where required.

9 (10) A description of the method used to award the contract. If
10 best value was the method, the report shall describe the factors
11 used to evaluate the bid, including the weighting of each factor
12 and an assessment of the effectiveness of the methodology.

13 (11) An assessment of the project impact of “skilled labor
14 force availability.”

15 (12) An assessment of the design-build dollar limits on
16 sanitation district projects. This assessment shall include
17 projects where the sanitation district wanted to use the
18 design-build method and was precluded by the dollar limitation.
19 This assessment shall also include projects where the best value
20 method was not used due to dollar limitations.

21 (13) An assessment of the most appropriate uses for the
22 design-build approach.

23 (m) If the sanitation district elects to not use the authority
24 granted by this section, it may submit a report to the Legislative
25 Analyst’s Office explaining why the sanitation district elected to
26 not use the design-build method.

27 (n) On or before January 1, 2010, the Legislative Analyst shall
28 report to the Legislature on the use of the design-build method by
29 the sanitation district pursuant to this section, including the
30 information listed in subdivision (l). The report may include
31 recommendations for modifying or extending this section.

32 (o) Nothing in this section shall affect:

33 (1) The restrictions on subcontracting by a public agency
34 imposed by any applicable civil service or merit system.

35 (2) The obligation of any public agency, pursuant to state or
36 local ordinance, to meet and confer with any labor organization
37 concerning any matter within the statutory scop of
38 representation.

39 (p) This section shall remain in effect only until January 1,
40 2012, and as of that date is repealed, unless a later enacted

1 statute, that is enacted before January 1, 2012, deletes or extends
2 that date.

3 SEC. 2. Due to the unique circumstances of the Orange
4 County Sanitation District with respect to its mandate with the
5 federal Environmental Protection Agency and the State Water
6 Resources Control Board for the completion of an additional
7 secondary treatment facility within the district by December
8 2012, the Legislature hereby finds and declares that a general
9 statute cannot be made applicable within the meaning of Section
10 16 of Article IV of the California Constitution. Therefore, the
11 special legislation contained in Section 1 of this act is
12 necessarily applicable only to the Orange County Sanitation
13 District.

14 SEC. 3. No reimbursement is required by this act pursuant to
15 Section 6 of Article XIII B of the California Constitution because
16 the only costs that may be incurred by a local agency or school
17 district will be incurred because this act creates a new crime or
18 infraction, eliminates a crime or infraction, or changes the
19 penalty for a crime or infraction, within the meaning of Section
20 17556 of the Government Code, or changes the definition of a
21 crime within the meaning of Section 6 of Article XIII B of the
22 California Constitution.

23 SECTION 1. ~~Section 22947.9 is added to the Business and~~
24 ~~Professions Code, to read:~~

25 ~~22947.9. (a) In addition to any other remedies provided by~~
26 ~~this chapter or by any other provisions of law, the following~~
27 ~~persons may bring an action against a person or entity that has~~
28 ~~violated this chapter:~~

29 ~~(1) The Attorney General.~~

30 ~~(2) A district attorney.~~

31 ~~(3) A consumer who has computer software copied, installed,~~
32 ~~or executed on his or her computer in violation of this chapter.~~

33 ~~(4) An Internet service provider that provides Internet access~~
34 ~~services to a customer described in paragraph (3):~~

35 ~~(b) An action brought under this section may seek, for each~~
36 ~~instance of computer software copied, installed, or executed on a~~
37 ~~consumer's computer in violation of this chapter, either:~~

38 ~~(1) Actual damages; or~~

39 ~~(2) Statutory damages of one thousand dollars (\$1,000), up to~~
40 ~~a maximum of one million dollars (\$1,000,000) per version of~~

1 computer software. For any violation of a section of this chapter,
2 total statutory damages against the person or entity shall not
3 exceed one million dollars (\$1,000,000) per version of computer
4 software.

5 (e) A violation of this chapter is a misdemeanor punishable by
6 a fine of not more than one thousand dollars (\$1,000) or
7 imprisonment in a county jail for not more than one year, or by
8 both that fine and imprisonment.

9 (d) No provider of computer software or of an interactive
10 computer service may be held liable for claims brought by a
11 business against the provider for identifying, naming, removing,
12 disabling, or otherwise affecting a computer program through
13 any action voluntarily undertaken or service provided if the
14 provider establishes that it meets all of the following
15 requirements:

16 (1) Intended in good faith to identify accurately, prevent the
17 installation of or execution of, remove, or disable another
18 computer program on a computer of a customer of the provider.

19 (2) Reasonably believed that the computer program violated
20 this chapter.

21 (3) Notified the authorized user and obtained clear and
22 conspicuous consent before undertaking the action or providing
23 the service.

24 (4) Has established and followed internal practices and
25 procedures reasonably designed to determine whether or not a
26 computer program violates this chapter.

27 (5) Has established and followed a process for managing
28 disputes and inquiries regarding misclassification or false
29 positive identifications of computer programs.

30 (e) Nothing in this section is intended to limit the ability of the
31 Attorney General or a district attorney to bring an action against
32 a provider of computer software or of an interactive computer
33 service.

34 (f) Nothing in this section is intended to limit a consumer's
35 rights under existing law to bring an action against a provider of
36 computer software or of an interactive computer service.

37 (g) The failure of a provider to qualify for the protection
38 provided in this section shall have no effect on the consideration
39 of any other defense by the provider that its conduct does not
40 violate applicable law.

1 ~~SEC. 2.— No reimbursement is required by this act pursuant to~~
2 ~~Section 6 of Article XIII B of the California Constitution because~~
3 ~~the only costs that may be incurred by a local agency or school~~
4 ~~district will be incurred because this act creates a new crime or~~
5 ~~infraction, eliminates a crime or infraction, or changes the~~
6 ~~penalty for a crime or infraction, within the meaning of Section~~
7 ~~17556 of the Government Code, or changes the definition of a~~
8 ~~crime within the meaning of Section 6 of Article XIII B of the~~
9 ~~California Constitution.~~

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